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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE PAUL SCHROEDER,

Defendant and Appellant.

B203236

(Los Angeles County
Super. Ct. No. NA071405)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Richard R. Romero, Judge. Reversed and remanded.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson,
Juliet H. Swoboda and Blythe Leszkay, Deputy Attorneys General, for Plaintiff and
Respondent.

Lee Paul Schroeder appeals the judgment entered following his conviction by jury of evading an officer with willful disregard for the safety of persons or property. (Veh. Code, § 2800.2, subd. (a).) We conclude the judgment must be reversed based on instruction error.

FACTS AND PROCEDURAL BACKGROUND

1. Trial evidence.

Schroeder was charged with offenses arising out of two separate incidents.

a. The shooting incident of August 5, 2006.

Robert Alegria testified that, at approximately 2:00 a.m. on August 5, 2006, he stopped his car to speak to a male he knows as Gustavo. Schroeder approached and pistol whipped Gustavo with a nine-millimeter handgun. Schroeder then fired three shots at Alegria's car. As Alegria drove home, he reported the incident to police officers who were detaining other individuals.

Los Angeles Police Officer Thomas Baron spoke with Alegria, then went to the parking lot where Alegria indicated the shooting had taken place and recovered 2 nine-millimeter shell casings.

On August 23, 2006, Alegria identified Schroeder as the shooter in a photographic lineup.

As a result of this incident, Schroeder was charged with two counts of assault with a firearm.

b. The pursuit of Schroeder on August 24, 2006.

On August 24, 2006, Los Angeles Police Officer Mark Maldonado and his partner, Amgad Youssef, were driving southbound on Pacific Avenue when Maldonado saw a Ford waiting to turn right onto southbound Pacific Avenue from Tenth Street.

Maldonado recognized the driver of the Ford as Schroeder, whose photograph he had seen at roll call. Schroeder turned onto Pacific Avenue then immediately made a left turn at 11th Street. The officers made a U-turn and went down 12th Street to Mesa Street where Schroeder passed in front of them going southbound. Schroeder started to accelerate in a 25-mile-per-hour residential area. When Maldonado activated the siren

and red lights of his patrol vehicle, Schroeder increased his speed and went southbound in the next alley.

Maldonado pursued Schroeder through San Pedro for approximately eight miles on many different streets. Maldonado observed “numerous traffic violations, stop signs, speeding, reckless driving at a high rate of speed through residential areas.” After the pursuit passed through the Rancho San Pedro housing project several times on a variety of streets, residents came out of their homes and “were standing on the sidewalks as we passed by them at a high rate of speed.” Maldonado estimated the speeds at up to 45 miles per hour on residential streets. Schroeder went through at least five stop signs.

Youssef testified he observed multiple Vehicle Code violations during the pursuit, including running red lights, causing pedestrians to yield, driving onto the curb and making every turn without signaling at a high rate of speed in residential areas.

About halfway through the pursuit, Los Angeles Police Officer John Carlyle took over as the primary pursuit vehicle. Carlyle observed traffic violations including failure to stop at stop signs, unsafe driving and speeding in alleys and on residential streets.

Maldonado testified the pursuit ended when Schroeder went through a stop sign and attempted a right turn but went onto the sidewalk. After Schroeder hit the curb, he lightly struck a parked car then exited the Ford and threw a handkerchief into the air. When it unfolded, a dark object hit the ground on the other side of the Ford. Schroeder then ran east on 23rd Street. Maldonado recovered the discarded object and found it was a loaded nine-millimeter semiautomatic handgun.

Schroeder went over a wall and numerous officers followed him including Carlyle and Youssef. Carlyle jumped onto uneven ground and broke his left leg below the knee and his left ankle. Youssef followed Carlyle over the fence and broke his ankle but was able to assist Carlyle detain Schroeder. Both officers required surgery and were off work for two and a half to three months.

A criminalist testified the shell casings found in the parking lot on August 5, 2006, had been fired from the weapon Maldonado recovered.

As a result of this incident, Schroeder was charged with two counts of resisting arrest causing injury, evading pursuing officers with reckless disregard for the safety of persons or property and unlawful possession of a firearm.

2. Jury's verdicts and findings; admission of prior convictions; sentencing.

The jury convicted Schroeder only of evading an officer with willful disregard for the safety of persons or property. In connection with this verdict the jury specifically found true an allegation that Schroeder “drove with a willful and wanton disregard for the safety of persons or property” The jury acquitted Schroeder of assault with a firearm on Alegria and Gustavo and was unable to reach a verdict on the remaining counts, including the count alleging possession of the firearm allegedly discarded by Schroeder at the end of the pursuit. The trial court dismissed those counts on the grounds the prosecution had presented all the evidence at its disposal but had not secured a conviction.

Schroeder admitted two prior convictions within the meaning of the “Three Strikes” law. The trial court dismissed one of the prior convictions in the interest of justice and sentenced Schroeder to the upper term of three years, doubled to six years.

CONTENTION

Schroeder contends the trial court erroneously failed to instruct the jury on the lesser included offense of misdemeanor evading.

DISCUSSION

1. General principles.

“ ‘ “The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense.” ’ [Citation.] As [our Supreme Court has] explained, instructing on lesser included offenses shown by the evidence avoids forcing the jury into an ‘unwarranted all-or-nothing choice’ [citations] that could lead to an unwarranted conviction. [Citations.]” (*People v. Hughes* (2002) 27 Cal.4th 287, 365; *People v. Breverman* (1998) 19 Cal.4th 142, 162-163; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

Misdemeanor evading in violation of Vehicle Code section 2800.1 is a lesser included offense of felony evading in violation of Vehicle Code section 2800.2.

“The only distinction between the two crimes is that in committing the greater offense the defendant drives the pursued vehicle ‘in a willful or wanton disregard for the safety of persons or property.’ (Veh. Code, § 2800.2.)” (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680.)¹

2. *Schroeder’s arguments.*

Schroeder contends the jury should have been instructed on misdemeanor evading because the jury could have concluded his driving was not done with willful and wanton disregard for the safety of persons or property. (*People v. Hayes* (2006) 142 Cal.App.4th 175, 181-182; *People v. Springfield, supra*, 13 Cal.App.4th at p. 1681.) Schroeder notes he did not drive at an unusually high rate of speed, he did not come close to injuring any

¹ Vehicle Code section 2800.1, subdivision (a) states: “(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer’s motor vehicle, is guilty of a misdemeanor if all of the following conditions exist:

“(1) The peace officer’s motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.

“(2) The peace officer’s motor vehicle is sounding a siren as may be reasonably necessary.

“(3) The peace officer’s motor vehicle is distinctively marked.

“(4) The peace officer’s motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform.”

Vehicle Code section 2800.2 provides: “(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. . . .

“(b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.”

person or damaging any property and the only testimony that suggested he had committed three or more point violations was vague and weak. Schroeder points out that none of the officers provided details about the driving such as the location of the claimed traffic violations and the testimony of the officers was inconsistent. Schroeder notes two officers indicated Schroeder ran stop signs and one testified he ran red lights.

Additionally, other cases involving Vehicle Code section 2800.2 have stronger, more specific evidence. (See, e.g., *People v. Pinkston* (2003) 112 Cal.App.4th 387, 389-390.)

Schroeder argues it is clear the jury did not believe all of the officers' testimony because it did not convict him of possession of a firearm. According to Schroeder, the officers' descriptions of his driving were no more credible than their description of his possession of the discarded firearm. Schroeder concludes that because the testimony of the officers was reasonably susceptible to a finding Schroeder did not drive with willful or wanton disregard, a properly instructed jury might have convicted only of the lesser offense. (*People v. Diaz* (2005) 125 Cal.App.4th 1484, 1492; *People v. Springfield*, *supra*, 13 Cal.App.4th at p. 1680.)

3. The conviction of felony evading must be reversed.

It appears Schroeder's contention is well taken. As noted above, the only distinction between misdemeanor and felony evading is that the greater offense involves willful or wanton disregard for the safety of persons or property. (*People v. Springfield*, *supra*, 13 Cal.App.4th at pp. 1679-1680.)

Here, the trial court intended the jury to distinguish between the felony and misdemeanor offenses by requiring the jury to make a separate finding with respect to whether Schroeder drove with willful and wanton disregard for the safety of persons and property. Thus, the jury would have had the option of convicting Schroeder of the lesser offense simply by finding the willful and wanton allegation not true. However, the verdict form contains an error which renders the true finding on the willful and wanton disregard allegation superfluous.

The verdict form reads: “We the jury . . . find the defendant . . . guilty of the crime of evading an officer *with willful disregard*, as charged in Count 3 of the Information.” (Italics added.) The verdict form should have omitted the phrase “with willful disregard” and stated only, “We the jury . . . find the defendant guilty . . . of the crime of evading an officer . . . , as charged in Count 3 of the Information.” Had the verdict form been so limited, the further finding that Schroeder “drove with a willful [and] wanton disregard for the safety of persons or property” would have rendered the conviction a felony.

However, given that the verdict form only permitted a finding of the felony offense of “evading an officer with willful disregard,” the specific finding that Schroeder “drove with a willful [and] wanton disregard for the safety of persons or property” merely echoed the jury’s finding that Schroeder was guilty of the felony offense of “evading an officer with willful disregard” as set forth in the verdict. Consequently, the true finding on the special allegation added nothing to the verdict. Thus, due to the error in the verdict, both the verdict and the special allegation of willful and wanton disregard referred to the felony offense.

The People argue any error must be seen as harmless given the assertedly overwhelming evidence that Schroeder committed three moving violations and the jury’s finding that Schroeder drove with willful and wanton disregard. (See Veh. Code, § 2800.2, subd. (b).) However, the evidence was not overwhelming. As Schroeder notes, the testimony of the pursuing officers with respect to Schroeder’s driving was not as detailed as it might have been had evading an officer been the only charge being presented by the People. The officers who testified about the traffic violations did so in generalities. The only traffic violation specified in the testimony was the final stop sign violation committed by Schroeder immediately before the pursuit ended.

Additionally, it appears the jury distrusted the testimony of the pursuing officers. This is shown by the jury's acquittal on the count alleging possession of a firearm. The jury reached this result despite the testimony of three deputies that Schroeder discarded a handgun wrapped in a bandana at the end of the pursuit.

The jury's true finding on the willful and wanton disregard allegation did not render the error in the verdict form harmless. As set forth above, given the wording of the verdict form, the special finding merely reiterated the felony finding the jury already had made. Consequently, the verdict form inappropriately presented the jury with an "all or nothing" choice of conviction of the felony offense or acquittal. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 365.)

Given the foregoing, we conclude the conviction of evading an officer with willful and wanton disregard for the safety of persons and property must be reversed.

DISPOSITION

The judgment is reversed. The matter is remanded for retrial.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.